

EXECUTION COPY

**EXHIBIT G**  
**MOTION**

G-1

Deborah L. Schrier-Rape  
Texas State Bar No. 00785635  
**SCHRIER-RAPE, P.C.**  
5929 Westgrove Drive  
Dallas, Texas 75248  
Telephone. (972) 818-6761  
Facsimile: (972) 248-3229

Hearing Date:  
August 21, 2003  
Time: 10:30 a.m.

**CO-COUNSEL FOR THE DEBTORS**

Jon L.R Dalberg  
Calif. State Bar No. 128259  
Jason S. Brookner (JB-6166)  
**ANDREWS & KURTH L.L.P.**  
1717 Main Street, Suite 3700  
Dallas, Texas 75201  
Telephone: (214) 659-4400  
Facsimile: (214) 659-4401

**CO-COUNSEL FOR THE DEBTORS**

Paul M. Basta (PB-4344)  
Michelle V. Larson  
Texas State Bar No. 00796928  
**WEIL, GOTSHAL & MANGES LLP**  
200 Crescent Court, Suite 300  
Dallas, Texas 75201  
Telephone: (214) 746-7700  
Facsimile: (212) 746-7777

**SPECIAL CORPORATE COUNSEL FOR THE DEBTORS**

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
In re:

NEXTWAVE PERSONAL  
COMMUNICATIONS INC , et al.,

Debtors.  
----- X

Chapter 11

Case No. 98 B 21529 (ASH)  
  
(Jointly Administered)

**NOTICE OF MOTION PURSUANT TO SECTIONS 105, 363 AND 1146(c) OF THE  
BANKRUPTCY CODE AND FEDERAL RULES OF BANKRUPTCY PROCEDURE  
2002, 6004 AND 9019 FOR (A) AN INITIAL ORDER (i) APPROVING PROPOSED  
BIDDING PROCEDURES FOR SUBMISSION OF HIGHER AND BETTER OFFERS  
FOR THE SALE OF THE DEBTORS' RIGHTS AND INTERESTS IN CERTAIN  
DESIGNATED LICENSES, (ii) AUTHORIZING PAYMENT OF BREAK-UP FEE AND  
EXPENSE REIMBURSEMENT IN THE EVENT A HIGHER AND BETTER OFFER OR  
COMPETING PROPOSAL IS APPROVED AND CONSUMMATED, (iii)  
ESTABLISHING SALE AS CONTINGENT UPON APPROVAL OF FCC TERM SHEET,  
AND (iv) APPROVING FORM OF NOTICE AND SETTING HEARING AND RELATED  
DEADLINES WITH RESPECT TO SALE AND SETTLEMENT, AND (B) ORDER AT  
SALE AND SETTLEMENT HEARING (i) APPROVING THE TERMS AND  
CONDITIONS OF AN AGREEMENT FOR THE SALE OF THE DEBTORS' RIGHTS  
AND INTERESTS IN CERTAIN DESIGNATED LICENSES, (ii) AUTHORIZING THE  
SALE FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES,  
SUBJECT ONLY TO FCC REGULATORY REVIEW AND APPROVAL AND HSR  
APPROVAL (iii) AUTHORIZING DEBTORS TO SATISFY CERTAIN SECURED  
INDEBTEDNESS RELATED TO THE DESIGNATED LICENSES, AND (iv)  
APPROVING SETTLEMENT AND RELEASES BETWEEN THE DEBTORS AND THE  
FCC WITH RESPECT TO CLAIMS RELATED TO THE DESIGNATED LICENSES**

PLEASE TAKE NOTICE that on August 5, 2003, NextWave Personal Communications Inc. ("NPCI"), NextWave Partners Inc. ("NPI"), NextWave Power Partners Inc. ("NPPI"), NextWave Wireless Inc. ("NWI") and NextWave Telecom Inc. ("NTI"), the above-captioned debtors and debtors in possession, collectively, NPCI, NPI, NPPI, NWI, and NTI referred to hereinafter as "Debtors" or NextWave, filed their Motion (the "Motion") Pursuant to Sections 105, 363 and 1146(c) of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 2002, 6004 and 9019 for (A) an Initial Order, Approving, Among Other Things, (i) Proposed Bidding Procedures for Submission of Higher and Better Offers for the Sale of the Debtors' Rights and Interests in Certain Designated Licenses, (ii) The Payment of Break-Up Fee and Expense Reimbursement in the Event a Higher and Better Offer or Competing Proposal is Approved and Consummated, (iii) The Establishment of the Sale as Contingent Upon Approval of FCC Term Sheet and (iv) The Form of Notice and Setting Hearing and Related Deadlines with respect to Sale and Settlement (collectively, the "Bidding Procedures Order"), and (B) an Order at the Sale

and Settlement Hearing, Approving, Among Other Things, (i) The Terms and Conditions of an Agreement for the Sale of the Debtors' Rights and Interests in Certain Designated Licenses, (ii) The Sale Free and Clear of All Liens, Claims, and Encumbrances, subject only to (x) the FCC's regulatory powers and process with respect to transfer and disposition of the license assignment applications, including any related requests for relief under 47 C.F.R. §§ 24.714 and 1.2111, and any other applicable FCC rules and regulations ("FCC Regulatory Review and Approval"), (y) if FCC Regulatory Review and Approval is granted, payment by the Purchaser of the FCC Direct Payment (as defined in the FCC Term Sheet, as defined below), and (z) approval pursuant to the Hart-Scott Rodino Act (the "HSR Approval"), and exempt under 11 U.S.C. § 1146(c) from any stamp, transfer, sales, recording or similar tax; (iii) The Debtors to Satisfy Certain Secured Indebtedness Related to the Designated Licenses, and (iv) The Settlement and Releases Between the Debtors and the FCC with Respect to Claims Related to the Designated Licenses (collectively, the "Sale Order"). A hearing on the Debtors' request for entry of the Bidding Procedures Order will take place before the Honorable Adlai S. Hardin, Jr., United States Bankruptcy Judge, on August 21, 2003, at 10:30 a.m. (the "Hearing Date") in Room 520, United States Bankruptcy Court, Southern District of New York, 300 Quarropas Street, White Plains, New York 10601.

PLEASE TAKE FURTHER NOTICE that objections to entry of the Bidding Procedures Order, if any, must state the basis for the objection and be (i) in writing and conform to the Local Bankruptcy Rules for the Southern District of New York, including General Order No. 97-421 of the Bankruptcy Court dated June 26, 1997, regarding Electronic Means for Filing, Signing and Verification of Documents, the Administrative Procedures for Electronically Filed Cases attached as an exhibit thereto, and all requirements therein applicable to the electronic filing of

pleadings in the above-captioned Chapter 11 cases, (ii) filed with the Office of the Clerk, United States Bankruptcy Court for the Southern District of New York (White Plains), 300 Quarropas Street, White Plains, New York 10601, with a courtesy copy to Chambers and (iii) served upon (a) Schrier-Rape, P.C., co-counsel for the Debtors, 5929 Westgrove Drive, Dallas, Texas 75248 (Attn: Deborah L. Schrier-Rape); (b) Andrews & Kurth L.L.P., co-counsel for the Debtors, 1717 Main Street, Suite 3700, Dallas, Texas 75201 (Attn: Jason Brookner); (c) Weil Gotshal & Manges LLP, special corporate counsel for the Debtors, 767 Fifth Avenue, New York, New York 10153 (Attn: Paul M. Basta); (d) Kasowitz, Benson, Torres & Friedman, counsel for the Committee, 1633 Broadway, 22<sup>nd</sup> Floor, New York, New York 10019 (Attn: David M. Friedman); (e) Tory's, counsel for the DIP Lender, 237 Park Avenue, New York, New York 10019 (Attn: Emanuel Grillo); (f) Department of Justice, Assistant U.S. Attorney, Civil Division, counsel for the Federal Communications Commission, 33 Whitehall Street, 8th Floor, New York, NY 10004 (Attn: David J. Kennedy); (g) Kirkland & Ellis LLP, special counsel for the Federal Communications Commission, Aon Center, 200 East Randolph Drive, Chicago, Illinois 60601-6636 (Attn: David L. Eaton); (h) Alston & Bird LLP, counsel for the Proposed Purchaser, 1201 West Peachtree St., Atlanta, Georgia 30309-3424 (Attn: Bryan E. Davis and J. William Boone); and (i) Office of the U. S. Trustee for the Southern District of New York, 33 Whitehall Street, 21<sup>st</sup> Floor, New York, New York 10004 (Attn: Pamela Lustrin), together with proof of service such that they are received no later than 5 00 p m. on August 15, 2003 (the "Objection Date").

PLEASE TAKE FURTHER NOTICE that if no objections to the entry of the Bidding Procedures Order are timely filed and served, the Court may grant the relief requested therein without any further notice. Should the Bidding Procedures Order be entered, subsequent notice of the Sale and Settlement Hearing (as defined in the Motion) and related deadlines will be provided.

Dated: Dallas, Texas  
August 5, 2003

Respectfully submitted,

**SCHRIER-RAPE, P.C.**

By: /s/ Deborah L. Schrier-Rape  
Deborah L. Schrier-Rape  
Texas State Bar No. 00785635  
5929 Westgrove Drive  
Dallas, Texas 75248  
Telephone: (972) 818-6761  
Facsimile: (972) 248-3229

**CO-COUNSEL FOR THE DEBTORS**

Deborah L. Schrier-Rape  
Texas State Bar No. 00785635  
**SCHRIER-RAPE, P.C.**  
5929 Westgrove Drive  
Dallas, Texas 75248  
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Texas State Bar No. 00796928  
**WEIL, GOTSHAL & MANGES LLP**  
200 Crescent Court, Suite 300  
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UNITED STATES BANKRUPTCY COURT  
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In re:  
  
NEXTWAVE PERSONAL  
COMMUNICATIONS INC., et al.,  
  
Debtors.  
----- x

Chapter 11  
  
Case No. 98 B 21529 (ASH)  
  
(Jointly Administered)

**MOTION PURSUANT TO SECTIONS 105, 363 AND 1146(c) OF THE BANKRUPTCY CODE AND FEDERAL RULES OF BANKRUPTCY PROCEDURE 2002, 6004 AND FOR (A) AN INITIAL ORDER (i) APPROVING PROPOSED BIDDING PROCEDURES FOR SUBMISSION OF HIGHER AND BETTER OFFERS FOR THE SALE OF THE DEBTORS' RIGHTS AND INTERESTS IN CERTAIN DESIGNATED LICENSES, (ii) AUTHORIZING PAYMENT OF BREAK-UP FEE AND EXPENSE REIMBURSEMENT IN THE EVENT A HIGHER AND BETTER OFFER OR COMPETING PROPOSAL IS APPROVED AND CONSUMMATED, (iii) ESTABLISHING SALE AS CONTINGENT UPON APPROVAL OF FCC TERM SHEET, AND (iv) APPROVING FORM OF NOTICE AND SETTING HEARING AND RELATED DEADLINES WITH RESPECT TO SALE AND SETTLEMENT, AND (B) ORDER AT SALE AND SETTLEMENT HEARING (i) APPROVING THE TERMS AND CONDITIONS OF AN AGREEMENT FOR THE SALE OF THE DEBTORS' RIGHTS AND INTERESTS IN CERTAIN DESIGNATED LICENSES, (ii) AUTHORIZING THE SALE FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES, SUBJECT ONLY TO FCC REGULATORY REVIEW AND APPROVAL AND HSR APPROVAL, (iii) AUTHORIZING DEBTORS TO SATISFY CERTAIN SECURED INDEBTEDNESS RELATED TO THE DESIGNATED LICENSES, AND (iv) APPROVING SETTLEMENT AND RELEASES BETWEEN THE DEBTORS AND THE FCC WITH RESPECT TO CLAIMS RELATED TO THE DESIGNATED LICENSES**

TO THE HONORABLE ADLAI S. HARDIN, JR.,  
UNITED STATES BANKRUPTCY JUDGE:

NextWave Personal Communications Inc. ("NPCI"), NextWave Partners Inc. ("NPI"), NextWave Power Partners Inc. ("NPPI"), NextWave Wireless Inc. ("NWI") (NPCI, NPI, NPPI and NWI are collectively referred to herein as the "Subsidiary Debtors") and NextWave Telecom Inc. ("NTI") (NTI and the Subsidiary Debtors are collectively referred to herein as the "Debtors" or "NextWave"), the above-captioned debtors and debtors in possession, for their Motion Pursuant to Sections 105, 363 and 1146(c) of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure ("FRBP") 2002, 6004 and 9019 for (A) an Initial Order, Approving, Among Other Things, (i) Proposed Bidding Procedures for Submission of Higher and Better Offers for the Sale of the Debtors' Rights and Interests in Certain Designated Licenses, (ii) The Payment of Break-Up Fee and Expense Reimbursement in the Event a Higher and Better Offer or Competing Proposal is Approved and Consummated, (iii) The Establishment of the Sale as Contingent Upon Approval of FCC Term Sheet and (iv) The Form of Notice and Setting Hearing

and Related Deadlines with respect to Sale and Settlement (collectively, the "Bidding Procedures Order"), and (B) an Order at the Sale and Settlement Hearing, Approving, Among Other Things, (i) The Terms and Conditions of an Agreement for the Sale of the Debtors' Rights and Interests in Certain Designated Licenses, (ii) The Sale Free and Clear of All Liens, Claims, and Encumbrances, subject only to (x) the FCC's regulatory powers and process with respect to transfer and disposition of the license assignment applications, including any related requests for relief under 47 C.F.R. §§ 24.714 and 1.2111, and any other applicable FCC rules and regulations ("FCC Regulatory Review and Approval"), (y) if FCC Regulatory Review and Approval is granted, payment by the Purchaser of the FCC Direct Payment (as defined in the FCC Term Sheet, as defined below), and (z) approval pursuant to the Hart-Scott Rodino Act (the "HSR Approval"), and exempt under 11 U.S.C. § 1146(c) from any stamp, transfer, sales, recording or similar tax; (iii) The Debtors to Satisfy Certain Secured Indebtedness Related to the Designated Licenses, and (iv) The Settlement and Releases Between the Debtors and the FCC with Respect to Claims Related to the Designated Licenses (collectively, the "Sale Order"), respectfully represent as set forth below.

### **JURISDICTION**

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the Standing Order of Referral of Cases to Bankruptcy Court Judges of the District Court for the Southern District of New York, dated July 10, 1984 (Ward, Acting C.J.). Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

### **INTRODUCTION**

2. On June 8, 1998, each of the Subsidiary Debtors filed with this Court voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. On December 23, 1998, NTI

joined the Subsidiary Debtors by filing a voluntary petition for relief under Chapter 11. Pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code, the Debtors are operating their businesses and managing their properties as debtors-in-possession. The Debtors' cases are being jointly administered.

3. An Official Committee of Unsecured Creditors (the "Committee") was appointed on June 25, 1998 pursuant to Section 1102 of the Bankruptcy Code. On February 25, 1999, the Committee membership was amended as a result of the filing of NTI's Chapter 11 petition. The Committee membership was further amended on February 14, 2001.

### **BACKGROUND**

4. NextWave was formed in May 1995 to build and operate personal communications services ("PCS") systems in geographical areas referred to as Basic Trading Areas ("BTAs") on a nationwide basis.

5. NPCI participated in an auction conducted by the Federal Communications Commission (the "FCC") for C-Block PCS licenses and was ultimately declared the high bidder for C-Block PCS licenses covering 63 BTAs. Thereafter, NPPI participated in the FCC's auction of D, E and F-Block PCS licenses and was declared the high bidder for D, E and F-Block PCS licenses covering 32 additional BTAs (collectively, NextWave's 95 C, D, E and F-Block licenses are referred to hereinafter as the "Licenses"). NextWave's licensed service area is national in scope and includes most of the top 30 metropolitan markets.

6. Upon issuance of their Licenses in early 1997, NPCI and NPPI executed individual promissory notes and security agreements in favor of the FCC with respect to each C and F-Block PCS License.

7. Throughout the bankruptcy cases, NextWave has worked toward the goal of providing wholesale wireless telecommunication services on a nationwide basis, and on several

occasions has sought to confirm a plan of reorganization providing significant present and future value to its creditors and equity interest holders – many of whom invested money or services in NextWave in 1996 and 1997. Litigation between NextWave and the FCC ensued after commencement of the bankruptcy proceedings and the reorganization plans did not proceed.

8. Following the issuance of the United States Supreme Court's opinion in the case of *Federal Communications Commission v. NextWave Personal Communications Inc.*, 537 U.S. 293, 123 S. Ct. 832 (2003) (the "Supreme Court Opinion") NextWave began actively evaluating all reasonable options and opportunities for reorganization that maximize value for creditors and equity holders. The Debtors have explored multiple alternatives in parallel, including restructuring as a going concern utilizing all or some of their Licenses, as well as opportunities designed to optimize the usage and disposition of their spectrum assets. The Debtors and their investment bankers and financial advisors, UBS Warburg ("UBS"), have also engaged in discussions with telecommunications carriers who were bidders in Auction 35 that have expressed an interest in either acquiring certain of the Licenses or entering into a venture or other transaction with the Debtors.

9. The Debtors have an outstanding debtor-in-possession loan (the "Existing DIP Loan") in the principal amount of \$200 million. The Existing DIP Loan was set to mature on July 30, 2003. The Debtors are negotiating a short extension thereof with the DIP Lender, and are also exploring a potential refinancing (the Existing DIP Loan or any replacement debtor-in-possession loan approved by the Bankruptcy Court are hereinafter referred to as the "DIP Loan"). The Existing DIP Loan is secured by liens on the Licenses or the proceeds thereof. The FCC has also asserted liens on the Licenses. The actual amount of the FCC's claim(s) against the estates overall, and against the Designated Licenses (as defined below) has not yet been

determined. The Debtors and the FCC are seeking to consensually resolve the total amount of the FCC's claims against the estates, as well as claims the Debtors believe they have against the FCC.

10. After consultation with the Committee, the Debtors' DIP Lender, and the FCC, the Debtors determined that a sale of all of their rights and interests in certain of their Licenses (the "Designated Licenses")<sup>1</sup> on the terms discussed herein or on such higher and better terms as may be offered at an auction to be conducted in accordance with the Bidding Procedures (as defined below) (the "Proposed Sale"), is in the best interest of the Debtors' estates and will maximize value for creditors and equity holders. In conjunction with negotiating the Proposed Sale, the Debtors worked with the FCC to develop an approach that would allow the Proposed Sale to proceed, subject to regulatory approval, while the Debtors and the FCC continue to work toward a comprehensive resolution of the issues between them. The Debtors believe that the resolution reached with the FCC, approval of which is sought hereby, is in the best interests of their estates.

11. The Proposed Sale does not foreclose alternatives with respect to sale or use of the Debtors' remaining Licenses, nor does it preclude the Debtors' reorganization. The transaction proposed herein preserves the Debtors' ability to reorganize their business using their remaining Licenses and/or to move to sell additional Licenses at a later date and by separate motion, and to take whatever other actions are ultimately determined to be in the best interests of the Debtors' estates and that will maximize value for all of their creditors and equity holders.

#### **REQUEST FOR RELIEF**

12. The Debtors hereby request authority pursuant to Sections 105, 363 and 1146 of the Bankruptcy Code, to sell all of their rights and interests in the Designated Licenses, free and

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<sup>1</sup> A list of the Designated Licenses is attached as Exhibit A to the Agreement (as defined below), which is attached to this Motion as Exhibit A

clear of all liens, claims and encumbrances (the "Sale") to Cingular Wireless LLC (the "Proposed Purchaser"), subject to FCC Regulatory Review and Approval being granted, payment by the Proposed Purchaser of the FCC Direct Payment and HSR Approval, pursuant to that certain Purchase Agreement for the sale of all of the Debtors' rights and interests in the Designated Licenses dated as of August 4, 2003, a copy of which is annexed hereto as Exhibit "A" (the "Agreement"), and subject to higher and better offers obtained in accordance with the sale procedures proposed herein.<sup>2</sup> To facilitate the transfer of the Designated Licenses, the Debtors are concurrently seeking approval, pursuant to FRBP 9019, to resolve the amount of the FCC's claims with respect to the Designated Licenses (the "FCC Designated License Claims"), and any claims the Debtors may have against the FCC with respect to the Designated Licenses, as provided for in the Term Sheet between the Debtors and the FCC, a copy of which is attached hereto as Exhibit B (the "FCC Term Sheet"). The Agreement and the FCC Term Sheet contemplate payment of the FCC Designated License Claims through the FCC Direct Payment, and the DIP Loan from the remaining proceeds of the Sale. The resolution of the claims of the FCC and the Debtors against each other with respect to claims related to the Designated Licenses further contemplates that the FCC and the Debtors will each receive limited releases of such Designated License Claims from each other and from all creditors and shareholders of the Debtors. Proceeding with the Proposed Sale is contingent upon approval of the FCC Term Sheet. In addition, the FCC Term Sheet is subject to approval of the United States Department of Justice (the "DOJ"). If the DOJ has not approved the FCC Term Sheet by the initial hearing date set for this Motion, the hearing on the Motion will be continued if there has been no

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<sup>2</sup> As this Court has recognized, "highest" does not necessarily mean "best." *In re Brakalis*, 220 B.R. 525, 533 (Bankr S D N Y 1998) "[A debtor's] duty to maximize the return to a bankruptcy estate often does not require recommendation of the highest monetary bid." *Id.* (citing *In re Gil-Bern Indus., Inc.*, 526 F.2d 627, 629 (1<sup>st</sup> Cir. 1975)). As such, nothing herein, including any reference to "highest and best" offer, shall be construed to limit the Debtors' business judgment as it pertains to selecting the bid, of which the Debtors will seek Court approval.

decision by the DOJ by such date, or if such approval was not obtained the Motion will be withdrawn without prejudice.

13. By this Motion, the Debtors seek entry of the following orders:

- Bidding Procedures Order:

An order, the proposed form of which is annexed hereto as Exhibit "C" (the "Bidding Procedures Order"), (i) establishing procedures for the submission and consideration of competing offers to purchase the Designated Licenses (the "Bidding Procedures") at an auction (the "Auction"); (ii) approving the break-up fee and expense reimbursement arrangement with the Proposed Purchaser pursuant to which the Debtors would pay the Proposed Purchaser 1.5% of Purchase Price (as hereinafter defined) on the terms set forth in the Agreement (including the sources of payment set forth therein), in the event that the hearing on this Motion leads to approval and then consummation of a higher or better offer or a Competing Proposal is consummated; (iii) establishing the sale as contingent upon approval of FCC Term Sheet; and (iv) approving the proposed form and manner of notice of auction and sale hearing (the "Notice of Auction and Sale Hearing"), a copy of which is attached hereto as Exhibit "D".

- Sale Order:

An order, the proposed form of which is annexed hereto as Exhibit "E" (the "Sale Order") following the Sale, approving (i) the sale/transfer of the Debtors rights and interests in the Designated Licenses to the Proposed Purchaser (or to such other party that is determined by the Debtors, after consultation with the Committee, the FCC and the DIP Lender, following the conclusion of the Auction to have submitted the highest and best offer), free and clear of liens, claims and Encumbrances (as defined in the Agreement), subject to FCC Regulatory Review and Approval being granted, payment by the Purchaser of the FCC Direct Payment and HSR Approval, (ii) the payment of the DIP Loan and the FCC Designated License Claims, and the Indemnity Escrow Amount (as defined in the Agreement), and (iii) the FCC Term Sheet.

### SALE OF THE DESIGNATED LICENSES

14. For the past several months, the Debtors and their various constituencies have been evaluating all reasonable restructuring alternatives in order to maximize the value of the estates. Throughout this time period, a number of parties expressed interest in acquiring certain of the Debtors' Licenses. Following discussions with various telecommunications carriers, with input from the Committee and the DIP Lender, the Debtors determined that the offer of the Proposed Purchaser represented the highest and best offer for the Designated Licenses. After

several months of negotiations, on August 4, 2003, the Debtors and the Proposed Purchaser entered into the Agreement.

15. The Agreement, which is subject to Bankruptcy Court approval, provides for the sale and transfer of the Debtors' rights and interests in the Designated Licenses on the terms set forth below.

16. The principal terms of the Agreement are as follows:<sup>3</sup>

- Purchase Price: The Proposed Purchaser shall purchase from the respective license-holding subsidiary debtors, NPCI or NPPI, the Designated Licenses, free and clear of all Encumbrances, for cash consideration of \$1.40 billion (the "Purchase Price").
- Closing Date: The closing shall occur as soon as practicable after (i) receipt of Bankruptcy Court approval of the Agreement, by Final Order; (ii) HSR Approval; and (iii) FCC Regulatory Review and Approval, by Final Commission Order, of the transfer of the Designated Licenses (the "Closing Date").
- Debtors' Rights and Interests in Designated Licenses to be Sold: Debtors' rights and interests in the thirty-four (34) Licenses (some of which are 10 or 20 MHz of 30 MHz C Block Licenses held by NPCI) listed on Exhibit A to the Agreement are to be sold.
- Warranty. The Debtors' rights and interests in the Designated Licenses are being sold with only those representations, warranties and indemnifications as set forth in the Agreement and the FCC Term Sheet.
- Closing Conditions: Closing is subject to Bankruptcy Court approval by Final Order, FCC Regulatory Review and Approval being granted by Final Order, HSR Approval, approval of the FCC Term Sheet by the Bankruptcy Court without modification and other conditions set forth in the Agreement.
- Bidding Procedures: The Agreement provides that the Debtors shall file and diligently prosecute a motion seeking entry of an order (the "Bidding Procedures Order") of the Bankruptcy Court approving certain bidding protections (the "Bidding Procedures") for the Proposed Purchaser, including a payment of a break-up fee of 1.5% of the Purchase Price (the "Break-up Fee") to the Proposed Purchaser out of the proceeds of a

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<sup>3</sup> This summary is qualified in its entirety by reference to the provisions of the Agreement and the Bidding Procedures. Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to them in the Agreement.

Winning Bid or Competing Proposal if a Winning Bid or Competing Proposal is approved and consummated; setting a deadline for the submission of Qualified Bids; setting an initial minimum overbid requirement of the Purchase Price plus the Break-up Fee, plus \$40 million or \$1.461 billion (the "Overbid Threshold"); fixing subsequent bidding increments of not less than \$10 million; and other customary bid protections. The Bidding Procedures Order must be entered no later than August 29, 2003. The Sale Order must be entered no later than October 17, 2003. If the Debtors do not obtain the requisite orders prior to the stated deadlines, either the Proposed Purchaser or the Debtors may terminate the Agreement. A full copy of the proposed Bidding Procedures is attached hereto as Exhibit "F."

- Satisfaction of Claims: The Agreement contemplates the payment of (i) the FCC Designated License Claims through the FCC Direct Payment and (ii) the DIP Loan.

### AUTHORITY

#### A. Sale or Use of Assets Out of the Ordinary Course.

17. Section 363(b)(1) of the Bankruptcy Code provides that "[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Section 363(b), however, does not provide an express standard for determining whether the Court should approve any particular purchase or sale. Rather, the "articulated business justification" standard has been used by courts for sale transactions of assets outside the ordinary course of business. This standard, first enunciated by the Second Circuit Court of Appeals in the *Lionel* case, has essentially become the guidepost for asset sales:

The history surrounding the enactment in 1978 of current Chapter 11 and the logic underlying it buttress our conclusion that there must be some articulated business justification, other than appeasement of major creditors, for using, selling or leasing property out of the ordinary course of business before the bankruptcy judge may order such disposition under section 363(b).

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The rule we adopt requires that a judge determining a §363(b) application expressly find from the evidence presented before him at the hearing a good business reason to grant such an application.

*In re Lionel Corp.*, 722 F.2d 1063, 1070-71 (2d Cir. 1983). See also *In re Gucci*, 126 F.3d 380, 387 (2d Cir. 1997); *In re Continental Airlines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986) (adopting *Lionel* standard); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) (same); *In re Montgomery Ward Holding Co.*, 242 B.R. 147, 153-55 (D. Del. 1999); *In re Ionosphere Clubs, Inc.*, 184 B.R. 648, 653 (S.D.N.Y. 1995); *In re Delaware & Hudson Rwy. Co.*, 124 B.R. 169, 176 (D. Del. 1991); *In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877, 886-90 (Bankr. S.D.N.Y. 1990) (applying *Lionel* factors).

18. It has generally been determined and accepted that a sale out of the ordinary course of business pursuant to Section 363(b)(1) of the Bankruptcy Code will be approved if (i) the sale is supported by the debtor's business judgment, (ii) the sale price is fair and reasonable, (iii) adequate and reasonable notice has been provided, and (iv) the transfer is made in good faith. *In re Apex Oil Co.*, 92 B.R. 847, 866 (Bankr. E.D. Mo. 1988) (citing cases); *In re Phoenix Steel Corp.*, 82 B.R. 334, 335-36 (Bankr. D. Del. 1987).

19. A court should not second-guess a debtor's business judgment unless the judgment is clearly erroneous, too speculative or contrary to the provisions of the Bankruptcy Code. "More exacting scrutiny would slow the administration of the debtor's estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially." *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

20. Subject to compliance with the Bidding Procedures, the Debtors respectfully submit that these elements have all been satisfied in the instant case.

**B. Business Judgment, Sale Price and Good Faith.**

21. The decision to sell the Debtors' rights and interests in the Designated Licenses in accordance with the terms and conditions of the Agreement was made through an exercise of the Debtors' sound business judgment. The Debtors have determined, as a result of their asset value maximization efforts and their reorganization restructuring goals, that the continued operation and holding of the Designated Licenses is not necessary for the Debtors to complete their reorganization. By selling their interest in the Designated Licenses, the Debtors will generate cash sufficient to satisfy the FCC Designated License Claims and the DIP Loan, while leaving more than \$460 million in the Debtors' estates which can be devoted to their reorganization. The Purchase Price provided in the Agreement represents the best offer received by the Debtors to date. The Debtors believe that the Purchase Price represents fair market value for the Designated Licenses and that the Agreement is the culmination of good faith, arms' length negotiations between the Debtors and Proposed Purchaser and is not in violation of Section 363(n) of the Bankruptcy Code. Therefore, the Proposed Sale of the Designated Licenses is well within the sound business judgment of the Debtors.

22. Accordingly, the Debtors respectfully submit that, for the reasons stated above, the Court should authorize the Proposed Sale of the Designated Licenses in accordance with the Bidding Procedures and the Agreement. In addition, the Debtors respectfully submit that the Proposed Purchaser is a purchaser in good faith as such term is used in Section 363(m) of the Bankruptcy Code.

**C. Sale Free and Clear.**

23. The Debtors request that the Debtors' rights and interests in the Designated Licenses be sold, pursuant to Section 363(f) of the Bankruptcy Code, free and clear of all Encumbrances (as defined in the Agreement), subject only to FCC Regulatory Review and

Approval, payment by the Proposed Purchaser of the FCC Direct Payment, and HSR Approval, with such Encumbrances (other than those Encumbrances asserted by the DIP Lender and the FCC which are to be satisfied in full, (a) in the case of the FCC, upon FCC Regulatory Review and Approval being granted and payment by the Purchaser of the FCC Direct Payment, and (b) in the case of the DIP Lenders or the Replacement DIP Lenders, from the Sale proceeds), if any, to be transferred and attached to the net proceeds obtained for the Designated Licenses with the same validity, priority and effect such Encumbrances had upon the Designated Licenses immediately prior to the transfer of all of the Debtors' rights and interests in them, subject to further order of the Court.

24. Pursuant to Section 363(f) of the Bankruptcy Code, a debtor may sell property free and clear of liens, if one of the following conditions is satisfied:

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interests.

11 U.S.C. § 363(f). The Debtors submit that the requirements set forth in Section 363(f) of the Bankruptcy Code are satisfied and, therefore, the Court is authorized to grant the relief requested.

#### **D. Transfer Taxes.**

Section 1146(c) of the Bankruptcy Code provides that:

[t]he issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under

section 1129 of this title, may not be taxed under any law imposing a stamp or similar tax.

11 U.S.C. §1146(c). Section 105(a) of the Bankruptcy Code provides that:

[t]he court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. No provisions of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. §105(a).

25. Consistent with Section 105(a) of the Bankruptcy Code, the exemption from “stamp or similar taxes” provided under Section 1146(c) of the Bankruptcy Code, has been broadly construed by bankruptcy courts to include asset sales and transfers that occur prior to confirmation of a Chapter 11 plan. The term “stamp or similar taxes” includes transfer taxes. *See In re 995 Fifth Avenue Assocs.*, 963 F.2d 503, 501-11 (2d Cir. 1992). Consistent with the foregoing, the Debtors request the sale contemplated by the Agreement be exempt from transfer taxes under Section 1146(c) of the Bankruptcy Code.

**E. Satisfaction of Indebtedness Related to the Designated Licenses.**

26 Section 105(a) of the Bankruptcy Code empowers the Court to “[i]ssue any order, process or judgment that is necessary or appropriate to carry out the provisions of [title 11].” 11 U.S.C. §105. Under Section 105, the Court can permit pre-plan payment of a prepetition obligation. Although certain courts have found that Section 105 “may not be used as a vehicle to discriminate among priority claims when there is no compelling business need for such discrimination,” *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992), such argument is not applicable to the instant case in which Section 507 does not truly address priorities of payment

with regard to secured claims. As the court stated in *In re Chateaugay Corp.*, 80 B.R. 279, 287 (S.D.N.Y. 1987):

A rigid application of the priorities of § 507 would be inconsistent with the fundamental purpose of reorganization and of the Act's grant of equity powers to bankruptcy courts, which is to create a flexible mechanism that will permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately. The Supreme Court has emphasized the special nature of reorganization proceedings.

It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised and to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile.

(citing *Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pacific Hwy.*, 294 U.S. 648, 676 (1935)).

27. The Debtors seek herein to have the FCC Designated License Claims paid through the FCC Direct Payment and the DIP Loan paid from the remaining proceeds of the Proposed Sale. The Debtors submit that the payment of such indebtedness is appropriate in this case as the DIP Lender and the FCC each claim liens on all the Designated Licenses and such liens, if allowed, would follow the proceeds from the Proposed Sale in any event.

**F. Bidding Procedures.**

28. The purpose of establishing bidding procedures is to facilitate an open and fair sale in an effort to maximize the value for the estate. *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998). Further, bidding procedures proposed by a debtor-in-possession are entitled to respect and deference from a court, so long as the burden of giving sound business reasons is met. *In re Official Comm Of Subordinated Bondholders v. Integrated Resources, Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992); *In re Gulf States Steel, Inc of Ala.*, 285 B.R. 497, 514 (Bankr. N.D. Ala. 2002)

29. The Agreement provides that the Proposed Sale of the Designated Licenses will be subject to Bankruptcy Court approval. The Debtors seek approval to sell their interest in the Designated Licenses to the Proposed Purchaser pursuant to the terms of the Agreement, subject to higher and better offers. In contemplation of this Motion, the Agreement specifies certain Bidding Procedures, which are summarized below and set forth in full in Exhibit "F" hereto.

30. Specifically, the Debtors propose that bids for the Designated Licenses be governed by the following procedures:

- Any party wishing to conduct due diligence on the Designated Licenses may do so upon execution of a confidentiality agreement in the form attached hereto as Exhibit "G".
- Any Qualified Bidder (as defined in the Bidding Procedures) desiring to submit a bid (a "Bid") for the Designated Licenses at the Auction, must deliver, in writing, its Bid to the Debtors' through their undersigned counsel and financial advisor at their respective specified addresses such that the Bid is actually received by each of the foregoing persons not later than 12:00 p.m. (Eastern time) on September 15, 2003 (the "Bid Deadline").
- To be considered, a "Bid" must consist of the following:
- The Qualified Bidder offers to purchase the Debtors' rights and interests in the Designated Licenses upon the terms and conditions set forth in the form of the Agreement, marked to show changes to the Agreement, including price;
- The Qualified Bidder's offer is irrevocable until the earlier of the closing of the Sale of the Designated Licenses or 30 days after the entry of the Sale Order approving the Proposed Sale of the Designated Licenses;
- The bid letter shall be accompanied by:
  - a deposit in a form acceptable to the Debtors in the amount of 1.5% of the Purchase Price payable to the order of UBS, as agent for the Debtors (the "Earnest Money Deposit"); and
  - written evidence of a commitment for financing or other evidence of ability to consummate the Proposed Sale; and

- The Qualified Bidder offers to make the FCC Direct Payment as provided in paragraph 2(a) of the FCC Term Sheet.
- Unless waived by the Debtors and the Proposed Purchaser, the Debtors will consider a bid from a Qualified Bidder (other than the Proposed Purchaser) only if the bid:
  - provides overall value for the Designated Licenses to the Debtors of at least the Purchase Price plus \$61 million (consisting of Break-Up Fee and \$40 million, being together the “Overbid Threshold”);
  - is on terms that in the Debtors’ reasonable business judgment, are not materially more burdensome or conditional than the terms of Proposed Purchaser’s Agreement;
  - is not conditioned on obtaining financing or on the outcome of unperformed due diligence by the Qualified Bidder;
  - does not request or entitle the bidder to any break-up fee, termination fee, expense reimbursement or similar type of payment;
  - provides for the purchase of all of the Debtors’ rights and interests in the Designated Licenses and only the Designated Licenses to be purchased by the Proposed Purchaser under the Agreement;
  - in the Debtors’ good faith opinion, is likely to receive all necessary federal and state regulatory approvals; and
  - is received by the Bid Deadline.
- A bid received from a Qualified Bidder that meets the above requirements is a “Qualified Bid.” A Qualified Bid will be valued based upon factors such as net value provided by such bid and the likelihood and timing of consummation.
- Bidders and all other entities shall keep Bids confidential, with access restricted to the Proposed Purchaser, Debtors, the Committee, the FCC and the DIP Lender, and any of their respective professionals. Debtors may request additional information from a bidder other than Proposed Purchaser (whether previously qualified or not) in order to evaluate the bidder’s ability to consummate a transaction and to fulfill its obligations in connection therewith, and such bidder shall be obligated to provide such information as a precondition to participating further in the Auction.
- Only Qualified Bids shall be considered at the Auction. The Auction shall be conducted by the Debtors or their representatives and shall commence on September 23, 2003, at 9 o’clock a.m. at the offices of UBS located at 299 Park Avenue, New York, New York 10171.

- If at least one Qualified Bid has been received (the "Topping Bid"), the Debtors may conduct an Auction in accordance with the terms below. Only Qualified Bidders (including the Proposed Purchaser) will be eligible to participate at the Auction. At least two (2) business days prior to the Auction, each Qualified Bidder (including the Proposed Purchaser or its Affiliates, any of which is deemed a Qualified Bidder) who has submitted a Qualified Bid must inform the Debtors whether it intends to participate.
- At the Auction, only the Proposed Purchaser and such Qualified Bidders who have submitted Qualified Bids in attendance at the start of the Auction shall be entitled to make any additional bids. The additional bids will be made and received in one room, on an open basis, and all other bidders shall be entitled to be present for all bidding with the understanding that the true identity of each bidder (including such bidder's ultimate parent) shall be fully disclosed to all other bidders and that all material terms of each bid will be fully disclosed to all other bidders throughout the entire Auction.
- At the Auction, all increases in bids following receipt of a bid in the amount of the Overbid Threshold shall be made in increments of no less than \$10 million with the Proposed Purchaser receiving credit for the Break-Up Fee. Bidding at the Auction shall continue until such time as the highest and best offer is determined. For the avoidance of doubt, during the Auction, in order for an additional bid by the Proposed Purchaser or any of its Affiliates to top the Topping Bid or any other additional bid (other than its own), the Proposed Purchaser's additional bid (or the additional bid of any Affiliate of the Proposed Purchaser) shall be not less than \$10 million greater than the Topping Bid or any other subsequent bid less \$21 million.
- At the conclusion of the Auction, Debtors, after consultation with the Committee, the FCC, and the DIP Lender, will select the bid that the Debtors determine to be the highest and best offer for the Licenses (the "Winning Bid"). Debtors shall file a notice with the Court of such election and present the Winning Bid to the Court for approval. The party that submits the Winning Bid shall be referred to as the "Winning Bidder". Unless and to the extent otherwise agreed to by the Debtors, the Winning Bidder will enter into a definitive agreement before the Auction is adjourned. No offer shall be deemed accepted unless and until it is approved by the Bankruptcy Court.
- Within 30 business days after a Winning Bid has been selected and the Proposed Sale of the Designated Licenses has been approved by the Court, the Earnest Money Deposits of the Qualified Bidders who are not the Winning Bidder shall be returned, provided such Qualified Bidder has not appealed from the order approving the Proposed Sale of the Designated Licenses.

- The Debtors shall apply the deposit of the Winning Bidder to the Purchase Price at the Closing.
- In the event a bidder submitting a Qualified Bid or Competing Proposal is accepted following the conclusion of the Auction (as determined by the Debtors and the Court), and such high bidder fails to consummate the proposed transaction by the Closing Date due to a breach by such high bidder, the deposit shall be forfeited to the Debtors (but not as liquidated damages, the Debtors herein reserving the right to pursue all remedies that may be available to them), and the Debtors may consummate the proposed transaction with the next highest bidder at the final price bid by such bidder at the Auction (or, if such bidder is unable to consummate the transaction at such price, the Debtors may consummate the transaction with the next highest bidder, and so forth), all at the Debtors' option (*i.e.*, the Debtors are not obligated to take the next highest bid). The agreement with the highest bidder shall be deemed in full force and effect through the Closing Date.
- The Bidding Procedures Order shall provide that the Sale is contingent upon the approval of the FCC Term Sheet without modification and that the Sale will not proceed without such approval.

31. Although courts articulate different standards in determining whether a proposed bidding procedure is proper, the fundamental premise remains the same, *e.g.*, maximizing the value to the estate. *In re Bidermann Indus.*, 203 B.R. 547, 553 (Bankr. S.D.N.Y. 1997). The Debtors submit that the foregoing Bidding Procedures provide a fair and reasonable means of ensuring the Debtors' interest in the Designated Licenses are sold for the highest and best offer obtainable. Such procedures afford potential purchasers a reasonable opportunity to investigate the Designated Licenses and afford the Debtors requisite time to consider and evaluate any Qualified Bids submitted. Based upon the foregoing, the Debtors submit the Bidding Procedures are in the best interests of the Debtors' estates and should be approved.

**G. The Proposed Break-Up Fee and Expense Reimbursement.**

32. The Debtors also request approval, pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code, of the proposed Break-Up Fee of \$21 million, representing one and one-half percent (1 5%) of the Purchase Price, which would be payable by the Debtors to the Proposed

Purchaser from the proceeds of a Winning Bid or Competing Proposal for an alternative transaction that is approved by the Bankruptcy Court and consummated. As a stalking horse bidder, the Proposed Purchaser has established a guaranteed return for the Debtors' estates and creditors. Even if the Proposed Purchaser ultimately is not the successful bidder, the Debtors and their estates will have benefited from the higher purchase price established by the improved bid. The proposed Bidding Procedures require that in order to qualify, Qualified Bids exceed the Purchase Price by a minimum of \$61 million. Thus, if an alternative transaction ultimately is approved and consummated, the Break-Up Fee will only be payable after the sale proceeds have been received by the Debtors' estates and from amounts that are in excess of the Purchase Price. Consequently, there will be no diminution in value to the Debtors' estates if the Break-Up Fee is ultimately paid.

33. In addition to the Break-Up Fee, Debtors have agreed to pay the Proposed Purchaser an expense reimbursement not to exceed \$400,000 in the event the Agreement is terminated (i) as a result of breach by Debtors; (ii) as a result of an order having been entered prohibiting the transaction; (iii) because Debtors' bankruptcy cases are dismissed or converted and as a result of such dismissal or conversion the Proposed Sale is not consummated; (iv) because the Sale Order is not entered by October 17, 2003; or (v) because the Closing does not occur by January 31, 2003 (unless such date is extended pursuant to the Agreement).

34. In the non-bankruptcy context, break-up fees and expense reimbursements are common in corporate transactions. See, e.g., *In re Wintz Companies*, 230 B.R. 840, 846 (B.A.P. 8<sup>th</sup> Cir. 1999); *In re Integrated Resources, Inc.*, 135 B.R. 736, 750 (Bankr. S.D.N.Y.), *aff'd*, 147 B.R. 650 (S D N.Y. 1992). Courts in this district recognize that many of the same reasons for granting break-up fees and expense reimbursements in non-bankruptcy corporate transactions

apply in the bankruptcy context as well. For example, in *In re Integrated Resources*, the court noted that “[i]n order to encourage the making of bids, debtors entice potential purchasers by utilizing various incentives, such as break-up fees, topping fees and expense reimbursement agreements.” *Integrated Resources*, 135 B.R. at 750.

35. Other courts in this district have noted that break-up fees are often “legitimately necessary” in transactions to convince a “stalking horse” to enter the bidding by providing some form of compensation for the risk it is undertaking. *In re 995 Fifth Ave. Assocs., L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989).

36. Break-up fees and expense reimbursements are presumptively appropriate under the business judgment rule, and will generally be sustained so long as the fee is not so large that it chills the bidding process. *Integrated Resources*, 135 B.R. at 750. Stated slightly differently, “[w]hen reasonable in relation to the bidder’s efforts and to the magnitude of the transaction, break-up fees are generally permissible.” *995 Fifth Ave.*, 96 B.R. at 28 (citing *Cottle v. Storer Communication, Inc.*, 849 F.2d 570, 578 (11<sup>th</sup> Cir. 1988)).<sup>4</sup>

37. The proposed bidding protections meet the “business judgment” rule standard. The Break-Up Fee and the Expense Reimbursement are reasonable because they are not excessive compared to fees and reimbursements approved in other cases in this Circuit. In addition, the Break-Up Fee will not diminish the Debtors’ estates. Break-up fees and expense reimbursements, such as proposed herein, enable a debtor to assure a sale to a contractually committed bidder at a price the debtor believes is fair and reasonable, while providing the debtor with the opportunity of obtaining even greater benefits for the estate through a sale process.

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<sup>4</sup> In approving a \$500,000 to \$9 million graduated break-up fee plus expense reimbursement, the *Integrated Resources* court noted that break-up fees have been approved by bankruptcy courts in this district in numerous cases (discussing *995 Fifth Ave.*, 96 B.R. at 28 (\$500,000 break-up fees approved after sale of \$76 million hotel), *In re Crowthers McCall Pattern, Inc.*, 115 B.R. 877, 879 (Bankr. S.D.N.Y.) (1990) (\$500,000 break-up fee on a \$45 million sale), *In re TVSI Holdings, Inc., et al.*, Nos. 90B 13581-13586, 90B 13586-13864 (CB) (Bankr. S.D.N.Y. 1991) (\$3.5 million break-up fee in transaction involving \$138 million in cash consideration and equity as well as assumption of pre- and post-petition obligations of Debtor)).

38. Accordingly, the Debtors request that the Court approve (i) the Break-Up Fee, (ii) the Expense Reimbursement, and (iii) the proposed form of the Bidding Procedures Order, including the provision that entry of the Sale Order is conditioned upon approval of the FCC Term Sheet, without modification.

**H. FCC Claim Resolution and Exchange of Limited Mutual Releases.**

39. As indicated above, the Debtors and the FCC have reached resolution of the FCC's claims with respect to the Designated Licenses. The resolution provides that the FCC will receive a minimum of \$714 million directly from the Proposed Purchaser (or other Winning Bidder) in full satisfaction of any claims the FCC may have against the Debtors or their estates with respect to the Designated Licenses. The resolution further provides that after funding of the Indemnity Escrow of \$20 million, the remaining proceeds (a minimum of \$666 million without accounting for the potential of any higher or better offers) (the "NextWave Proceeds") shall be property of the Debtors' estates free and clear of any liens, claims, encumbrances, rights or interests of the FCC. To the extent the Indemnity Proceeds are released pursuant to the terms of the Agreement, they will similarly become NextWave Proceeds. Further, to the extent that the Auction results in approval of a Winning Bid for the Designated Licenses of more than \$1.5 billion (the incremental \$100 million become NextWave Proceeds), the FCC Direct Payment will be increased by 34% of amounts over \$1.5 billion up to a maximum FCC Direct Payment of \$734 million for the Designated Licenses. As set forth in the FCC Term Sheet, the resolution also requires that the FCC and NextWave grant limited releases to each other from claims to the extent (and only to the extent) that such claims relate to the Designated Licenses. All claims in respect of the remaining, non-Designated Licenses held by NextWave are outside the scope of the limited releases contained in the Agreement and are preserved and not released, subject to a *pro-rata* reduction in damages to reflect the limited releases granted with respect to the

proportionate value of the Designated Licenses. The proposed releases contemplate that the FCC will receive the FCC Direct Payment free and clear of all liens, claims and encumbrances of NextWave or any of its creditors or interest holders and that NextWave is similarly receiving the NextWave Proceeds free and clear of any claims, liens, rights or interests of the FCC. The forms of releases to be exchanged by NextWave and the FCC and to be binding through the Sale Order on all NextWave creditors and equity interest holders are set forth in the FCC Term Sheet and in the proposed form of Sale Order attached hereto as Exhibit "E." Approval of the FCC Term Sheet, without modification, is a precondition to the Sale proceeding. Further, even following entry of the Sale Order, the Closing is conditioned upon FCC regulatory approval of the applications for assignment of the Designated Licenses. In addition, the FCC and the DOJ have preserved their rights with respect to federal taxes or the enforcement of the criminal, environmental or antitrust laws of the United States, or with respect to any action by the FCC pursuant to its regulatory authority over the Debtors as an FCC licensee, including without limitation its authority under the Communications Act and the FCC rules, regulations, policies and decisions, or with respect to any action or claim related to the Debtors' covenant regarding the provision of notice set forth in Section 3(a) of the FCC Term Sheet.

40. Federal Rule of Bankruptcy Procedure 9019(a) authorizes a court to approve a compromise or settlement when it is in the best interests of the estate. *In re Ashford Motels, Ltd.*, 226 B.R. 797, 802 (Bankr. S.D.N.Y. 1998). The Court should approve the settlement when it meets the lowest point in the range of reasonableness. *Id.* In making such a determination, the Court should consider the following factors:

- (1) The balance between the likelihood of the plaintiff or the defendant's success should the case go to trial as compared with the benefits of the settlement without the expense and delay of a trial;

- (2) The prospect of a complex and protracted litigation if the settlement is not approved;
- (3) The proportion of the creditors who do not object to, or who affirmatively support, the proposed settlement;
- (4) The proposed benefits to be received;
- (5) The nature and breadth of releases to be issued as a result of the settlement; and
- (6) The extent to which the settlement is truly the product of arms' length bargaining and not the product of fraud or collusion.

*Id.* (citing *In re Best Prods.*, 168 B.R. 35, 50 (Bankr. S.D.N.Y. 1994); *In re Fugazy*, 150 B.R. 103, 106 (Bankr. S.D.N.Y. 1993)).

41. The resolution between the FCC and the Debtors satisfies this standard. The resolution enables the Debtors and the FCC to resolve a portion of the disputes between them without resorting to additional litigation. The Debtors have negotiated the proposed resolution in good faith and believe it falls within the "lowest range of reasonableness" of the results they could have obtained in litigation, which would have been time-consuming and expensive. Accordingly, the Debtors respectfully submit that the proposed resolution of the claims between the FCC and the Debtors with respect to the Designated Licenses is in the best interest of their estates and should be approved.

42. As discussed above, the terms of the resolution between the FCC and NextWave additionally contemplate that the FCC will receive third party releases from all other creditors and equity or other interest holders in these Chapter 11 cases with respect to claims, causes of action, etc in respect of the Designated Licenses. Essentially, the limited release of the FCC by NextWave described above will also be applicable to all NextWave creditors and equity or other interest holders who might have, or believe they might have claims against the FCC related to the Designated Licenses.

43. There is a fairly well-defined body of case law regarding third party releases under a Chapter 11 plan of reorganization. However, the number of published opinions relating to third party releases in the settlement context is more limited. Two of the leading cases on this point, *Munford* out of the Eleventh Circuit and *Monarch Life Insurance* out of the First Circuit, support the bankruptcy court's ability to issue third party releases as part of a settlement.<sup>5</sup> Under the circumstances of these Chapter 11 cases, as well as under *Drexel* and its progeny in this Circuit, the Debtors respectfully submit that the third party releases called for by the Agreement and resolution with the FCC are justified and appropriate, consistent with Second Circuit precedent and public policy, and should be approved by the Court.

44. In *Munford v. Munford, Inc.*, 97 F.3d 449 (11<sup>th</sup> Cir. 1996), the Eleventh Circuit was faced with an appeal from a lower court's order which barred non-settling defendants from asserting contribution and indemnity claims against VRC, one of the other defendants in the litigation. Under the terms of the proposed settlement, VRC was to pay \$350,000 to the estate, but such payment was conditioned upon barring the other defendants from suing VRC under state law contribution and indemnity theories of recovery. In affirming the lower court's ruling and holding the third party releases to be valid, the Eleventh Circuit found that the releases not only served the public policy of settlement over litigation, but also had a direct impact on and nexus to the estate – i.e., if no third party releases then no money for the estate, and possibly years of continued litigation. Thus, according to the Eleventh Circuit, Section 105(a) and Rule 16 of the Federal Rules of Civil Procedure may be used by the bankruptcy court to fashion orders integral to settlements. See also *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 984-85 (1<sup>st</sup> Cir. 1995) (recognizing bankruptcy court's ability to issue third party injunctions). Although

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<sup>5</sup> The *Zale* case out of the Fifth Circuit came to a different conclusion, but is distinguishable, see paragraphs 55-57 *supra*

*Munford* was decided in the context of an adversary proceeding, the Eleventh Circuit's reasoning in *Munford* is directly applicable to these Chapter 11 cases and, given the history of the Debtors and the FCC, could not be any more compelling.

45. As the Court is keenly aware, this bankruptcy has a long and complicated history. Litigation between the Debtors and the FCC eventually found its way to the Supreme Court after winding through numerous courts and the FCC regulatory process. The Licenses in which the FCC claims liens are the centerpiece of the Debtors' estates and not only have been, but remain, subject to on-going dispute and potentially additional litigation. By issuing the third party releases, disputes and disagreements with respect to the Designated Licenses will be forever laid to rest, and the estates will receive a minimum (depending on overbids) of \$666 million with which to satisfy the Debtors' obligations under the DIP Loan (estimated to be approximately \$230 million) with the balance – more than \$400 million – to be used by the Debtors to foster their reorganization. Thus, there is significant and valuable consideration being provided for the release of the FCC provided for in the Agreement, which is itself limited to just the Designated Licenses – all claims in respect of the non-Designated Licenses and any or all non-license specific claims will remain intact and not released, subject to a *pro-rata* damage reduction for the proportionate value of the Designated Licenses. Although there is not an adversary proceeding currently pending with respect to the Designated Licenses, the FCC's revocation of the Debtors' Licenses in January 2000 has raised questions regarding how, and to what extent, the Debtors have been damaged by the FCC's actions. The Debtors have also evaluated claims arising from the FCC's actions with respect to the Debtors' prior plans and bankruptcy proceedings in general. These questions, and any claims that may arise from them, are not released in their entirety and may be subject to dispute, at least to the extent that they impact the Designated

Licenses, they will be resolved by the limited releases, effecting a reduction in the potential scope of the disputes between the Debtors and the FCC. The FCC believes that there are valid defenses to any and all claims the Debtors might bring against the FCC.

46. In addition, by approving the transaction set forth herein and approving the releases, the Court will unquestionably foster the plan formulation and reorganization process. In *Securities and Exchange Commission v. The Drexel Burnham Lambert Group, Inc. (In re The Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285 (2d Cir. 1992), the Second Circuit stated that “[i]n bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor’s reorganization plan”) (citing *In re A.H. Robins Co.*, 880 F.2d 694, 701 (4<sup>th</sup> Cir.), *cert. denied*, 493 U.S. 959 (1989)). Many other courts, both within and without the Second Circuit, have approved of third party releases when they play an important role in the reorganization process, or where the failure of an injunction/release to issue will adversely impact the estate or creditor recoveries. See, e.g., *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000), *In re Dow Corning Corp.*, 280 F.3d 648 (6<sup>th</sup> Cir. 2002); *In re Speciality Equip. Cos.*, 3 F.3d 1043 (7<sup>th</sup> Cir. 1993); *In re AOV Indus.*, 792 F.2d 1140 (D.C. Cir. 1986); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988); *LTV Corp. v. Aetna Cas. & Sur. Co. (In re Chateaugay Corp.)*, 167 B.R. 776 (S.D.N.Y. 1994); *Codfish Corp. v. FDIC (In re Codfish Corp.)*, 97 B.R. 132 (Bankr. D.P.R. 1988); *In re Monroe Well Serv., Inc.*, 67 B.R. 746 (Bankr. E.D. Pa. 1986).

47. Absent approval of the requested releases in this case, there will unquestionably be harm to the estates, in that the Agreement and the FCC Term Sheet, which is specifically conditioned upon the FCC receiving the limited releases, result in the Debtors’ receipt of at least \$666 million of earmarked proceeds. Once the liens securing the indebtedness under the DIP

Loan (estimated at approximately \$230 million) are satisfied, this money will be unencumbered by any FCC claims or liens and may be used by the Debtors to fund, among other things, operating expenses, on-going administrative expenses and, under a plan of reorganization, distribution to the Debtors' creditors. Absent approval of this Motion and the accompanying releases for the FCC, the estates will lose the opportunity to receive the benefit of these funds, with obvious and adverse effects on the Debtors' estates and their reorganization efforts. In addition, the Debtors re-emphasize that the releases are limited only to the Designated Licenses – all other claims and causes of action are preserved. The Sale is, however, contingent upon approval of the FCC Term Sheet, without modification, and it is therefore critical to the estates that such approval be obtained.

48. Finally, notwithstanding the fact that the Fifth Circuit's opinion in *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746 (5<sup>th</sup> Cir. 1995) would appear to hold to the contrary, the Debtors respectfully submit that, even under *Zale*, the proposed releases are appropriate, as *Zale* can be limited to its facts and otherwise distinguished from these cases.

49. In *Zale*, the bankruptcy court approved a settlement that permanently enjoined any and all third parties from ever pursuing the settling parties. The Fifth Circuit overturned the permanent injunction as impermissibly discharging a non-debtor and failing to provide an alternative means of recovery, *Zale*, 62 F 3d at 761, but stated that a temporary injunction might appropriately issue when there are unusual circumstances. *Id.* Such unusual circumstances include (i) where the debtor and non-debtor enjoy an identity of interests such that the suit against the non-debtor is essentially a suit against the debtor, and (ii) where the third party action will adversely impact the debtor's ability to accomplish reorganization.

50. The most important and critical distinguishing feature of *Zale* is that *Zale* involved director and officer litigation and the injunction would have ultimately deprived at least two parties from recovering on *affirmative and direct contract rights*. No such situation exists here, as, to the Debtors' knowledge, it is only they who have direct privity with the FCC with respect to the Designated Licenses.

51. As a result, and based upon the facts and history of these Chapter 11 cases and the Debtors' relationship with the FCC, the Debtors respectfully submit that the Court is authorized to issue the requested releases and, in fact, that it would be appropriate to do so.

**I. Initial Approvals.**

52. The relief sought by the Debtors herein contemplates a two-step process. First, the Debtors are requesting a hearing on August 21, 2003 (the "Bidding Procedures Hearing") on the preliminary matters which are necessary for the bidding process and ultimately the Sale Hearing to proceed. Specifically, at the Bidding Procedures Hearing, the Debtors intend to seek approval of the matters set forth in Sections F (Bidding Procedures), G (Break-Up Fee and Expense Reimbursement) and J (Notice) hereof (collectively referred to as the "Initial Approvals") and will request that the Bidding Procedures Order specifically provide that approval of the FCC Term Sheet without modification in the Sale Order is a condition precedent to the Sale proceeding. Should the Bidding Procedures Order be entered following the Bidding Procedures Hearing, the Debtors will provide subsequent notice as set forth in Section J below and in accordance with the Notice of Auction and Sale Hearing attached hereto as Exhibit "D," of the Sale Hearing and deadlines attendant thereto. Approval of the Sale and the FCC Term Sheet, as a condition precedent to entry of the Sale Order, will be sought at the Sale Hearing.

**J. Notice.**

53. Bankruptcy Rule 6004(a) provides that notice of a proposed Section 363 transaction outside of the ordinary course of business shall be provided to all creditors and indenture trustees, official committees and the U.S. Trustee. Fed. R. Bankr. P. 6004(a); *See also* Fed. R. Bankr. P. 2002(a)(2), (c)(1), (i), (k). The Debtors propose to give notice of this motion to (a) counsel for the Proposed Purchaser, (b) all parties identified by the Debtors or UBS as potential competing offerors, (c) all taxing authorities having jurisdiction with respect to the Designated Licenses, (d) all parties asserting Encumbrances against the Designated Licenses, (e) all creditors and additional parties in interest as requested by the Proposed Purchaser, the Committee, the DIP Lender or the FCC, (f) all parties in interest who have requested notice, (g) counsel for the Committee, (h) counsel for the FCC, and (i) counsel for the DIP Lender. The Debtors will also publish the Notice of Auction and Sale Hearing in the national edition of the Wall Street Journal for three (3) business days following entry of the Bidding Procedures Order.

**NO PREVIOUS REQUEST**

54. No previous request for the relief sought herein has been made to this Court or any other court.

**WAIVER OF MEMORANDUM OF LAW**

55. This motion includes citations to the applicable authorities and does not raise any novel issue of law. Accordingly, the Debtors respectfully request that the Court dispense with and waive the requirement for the submission of a memorandum of law contained in Local Bankruptcy Rule 9013-1(b).

WHEREFORE, the Debtors respectfully request that this Court enter an order granting the relief requested herein and such other or further relief as just and necessary.

Dated: Dallas, Texas  
August 5, 2003

Respectfully submitted,

**SCHRIER-RAPE, P.C.**

By: /s/ Deborah L. Schrier-Rape  
Deborah L. Schrier-Rape  
Texas State Bar No. 00785635  
5929 Westgrove Drive  
Dallas, Texas 75248  
Telephone: (972) 818-6761  
Facsimile: (972) 248-3229

**CO-COUNSEL FOR THE DEBTORS**